

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON E. TURNER,	§	
	§	No. 339, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of the
	§	State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	ID No. 0404017775
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 3, 2006
Decided: February 24, 2006

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 24th day of February 2006, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) Defendant Jason E. Turner appeals from his convictions by a Superior Court jury of Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance, Possession of a Non-Narcotic Schedule I Controlled Substance, and Possession of Drug Paraphernalia. Turner contends the trial judge erred in denying his motion for a missing evidence instruction to the jury. We find no merit to this argument and affirm.

(2) On April 23, 2004 Wilmington Police arrested Turner after observing him take money from three individuals and give them plastic bags in return. He

was transported to the Wilmington Police Department and strip searched in a room under video surveillance. The police testified that a packet containing 2.5 grams of crack cocaine fell from Turner's pants after he handed them to the police.

(3) The reasons for the surveillance video were explained at trial by the police. They routinely record a search for law enforcement officer safety and to protect the searching officer in case a defendant makes a complaint about police conduct in the area. The standard policy is for the Wilmington Police Department to hold the recording for thirty days. If there is no complaint against the officers, the Department routinely erases or records over the video tape.

(4) Almost one year after the search, defense counsel requested a copy of the videotape of the search of Turner. Because his request was not made or received until long after the thirty day period for preserving the tape, the tape had been erased pursuant to the standard policy.

(5) Turner claims that the failure of police to preserve the videotape falls within the scope of this Court's decision in *Lolly v. State*.¹ Turner claims he was entitled to a missing evidence instruction in light of the videotape's potential probative value. Specifically, Turner argues that the police had a duty to preserve the evidence, and that their breach of that duty caused undue prejudice. The State responds that there was no duty to preserve under the policies served by

¹ *Lolly v. State*, 611 A.2d 956 (Del. 1992).

videotaping, no timely demand for the tape, and therefore, no breach of police duties under *Deberry* and its progeny.²

(6) “This Court reviews *de novo* the Superior Court’s denial of a requested jury instruction.”³ In *Lolly*, this Court chose to “continue to adhere to the view that the *Deberry/Hammond* rationale, premised upon State constitutional standards of due process, should continue to control claims of prejudice arising from failure of police to gather or preserve evidence.”⁴ We have recognized that “there may be circumstances when the State failed to preserve evidence that was material to the defense and the defendant would be entitled to a missing evidence instruction.”⁵ At the heart of these cases is a dual-part analysis focusing on the conduct of the State and the nature of the missing evidence.⁶

(7) The videotape recording at issue here was made pursuant to an administrative procedure adopted for purposes of officer safety and for responding to complaints of police impropriety. The recording was not made with the purpose of gathering evidence for a criminal prosecution. There is no allegation of bad faith in this case. In the absence of a timely demand to preserve the tape,

² *Derberry v. State*, 457 A.2d 744 (Del. 1983). See *Hendricks v. State*, 871 A.2d 1118 (Del. 2005).

³ *Gutierrez v. State*, 842 A.2d 650, 651 (Del. 2003) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998)).

⁴ *Lolly*, 611 A.2d at 960 (citing *Deberry v. State*, 457 A.2d 744 (1983) and *Hammond v. State*, Del. Supr., 569 A.2d 81 (1989)).

⁵ *Hendricks*, 871 A.2d at 1124 (citing *Lolly*) (footnote omitted) (emphasis omitted).

⁶ *Id.*

compliance with the administrative protocol to erase the tape after thirty days expired was not wrongful. While there may be circumstances where a duty to preserve this kind of tape arises, the facts and circumstances of this case do not support that conclusion.

(8) Turner has not shown that the missing video substantially prejudiced his defense. This Court recently held in *Wainer v. State* that where “the State does not act negligently or in bad faith in failing to preserve evidence, and the missing evidence does not substantially prejudice the defendant’s case, a *Deberry* instruction is not necessary.”⁷ *Wainer* is applicable to Turner’s claim. On the facts of this case, we find that the Superior Court did not err when it denied Turner’s motion for a missing evidence instruction.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

⁷ *Wainer v. State*, 2005 Del. LEXIS 78, * 10 (Del. 2005) (citations omitted)